Hearings on Termination of Parental Rights

Chapter 18

Summary of Contents

Part I — Introduction

18.1 When the Court May Consider a Request for Termination of Parental Rights

The court cannot consider terminating a respondent-parent's parental rights and placing the child in the permanent custody of the court unless it has first established its jurisdiction under MCL 712A.2(b); MSA 27.3178(598.2)(b).* *In the Matter of Riffe,* 147 Mich App 658, 668 (1985), *In re Franzel,* 24 Mich App 371, 373 (1970), and *In re Kurzawa,* 95 Mich App 346, 356 (1980) (parents unable to control delinquent acts of their child; evidence completely insufficient to support taking jurisdiction of child or terminating parental rights).

*See Section 3.4 for a summary of the statutory bases for personal jurisdiction.

MCR 5.974 governs the procedural aspects of hearings on termination of parental rights. MCR 5.974(A)(1).*

*See Chapter 20 for information on termination proceedings involving Indian children.

A. At the Initial Dispositional Hearing

The court may enter an order terminating parental rights at the initial dispositional hearing pursuant to a request in an original or amended petition. MCL 712A.19b(1) and (4); MSA 27.3178(598.19b)(1) and (4).*

*See Section 18.17, below, for the required procedures.

B. When the Child Is in Foster Care or in the Custody of a Guardian

If parental rights were not terminated at the initial dispositional hearing and the child remains in foster care or in the custody of a guardian or limited guardian, the court may hold a hearing to decide whether to terminate parental rights following a dispositional review hearing or permanency planning hearing. The termination hearing is held after a supplemental petition is filed. MCL 712A.19b(1); MSA 27.3178(598.19b)(1).*

*See Section 18.19, below, for the required procedures.

Note: The federal Adoption & Safe Families Act (ASFA) requires that a petition requesting termination of parental rights must be filed if a child has been in foster care 15 of the most recent 22 months, unless a state agency demonstrates a compelling reason why termination is not in the best interest of the child, or the state has not provided necessary services for family reunification. For discussion of the requirements of ASFA, see Section 13.22 and Benchnotes 2 and 3.

C. When the Child Is Not in Placement

A child need not be placed in foster care before a court may entertain a petition requesting the termination of a respondent's parental rights. *In re Marin,* 198 Mich App 560, 568 (1993). In *Marin,* the Court of Appeals

concluded that although the trial court may be obligated under §19b(1) of the Juvenile Code to conduct a hearing on termination when the child remains in foster care, that section does not otherwise limit the conditions under which a petition for termination may be entertained. *Id.*

18.2 Effects of Termination of Parental Rights

If all parental rights to a child are terminated, the child will be placed in the permanent custody of the court. MCL 712A.19b(1); MSA 27.3178(598.19b)(1). If the court terminates parental rights, the court must order that additional efforts for the reunification of the child with the respondent will not be made. MCR 5.974(D) and MCL 712A.19b(5); MSA 27.3178(598.19b)(5). The court may then commit the child to the Michigan Children's Institute of the Family Independence Agency for adoptive planning, supervision, care, and placement. See MCL 400.203; MSA 25.383, and Form JC 63.

Parental rights may be reinstated by a supplemental order of disposition entered after rehearing pursuant to MCL 712A.21(1); MSA 27.3178(598.21)(1). The petition for rehearing must be filed not later than 20 days after the date of entry of the order terminating parental rights. *Id.**

*See Section 18.24, below (termination of one parent's rights) and Chapter 15 (rehearings).

18.3 Petition Requirements

A request for termination of parental rights must be made in an original, amended, or supplemental petition. MCR 5.974(A)(2).* Termination of parental rights at the initial dispositional hearing may be requested in an original or amended petition. See *In re Nunn*, 168 Mich App 203, 208–09 (1988) (due-process considerations are implicated where a parent's rights are terminated before a petition requesting termination is filed). Termination of parental rights on the basis of changed circumstances or after the child has been placed in foster care may be requested in a supplemental petition. MCL 712A.19b(4); MSA 27.3178(598.19b)(4), and MCR 5.974(D)(1), (E), and (F).

*See Form JC 04.

If the Family Independence Agency becomes aware of and substantiates, as provided in the Child Protection Law, additional abuse or neglect of a child who is already under the court's jurisdiction, the FIA must file a supplemental petition with the court. MCL 712A.19(1); MSA 27.3178(598.19)(1). However, a supplemental petition is not required to contain a request for termination of parental rights.*

*See Chapter 2 for a discussion of the Child Protection Law and Section 16.22 for a discussion of emergency removal hearings.

Note: See Section 2.21, which details the required response by FIA following an investigation of abuse or neglect, and provides new definitions of "substantiated" and "unsubstantiated" allegations. There is an apparent conflict between the mandatory petition required under MCL 712A.19(1); MSA 27.3178(598.19)(1), and "substantiated" allegations that the FIA places in Category III (evidence of abuse or neglect but low future risk of harm to the child), which does not *require* a petition to be filed with the court. If a supplemental petition is filed with the court under §19(1) containing allegations that the FIA has classified as Category III, the court has discretion to authorize the filing of the supplemental petition.

In *In re Pardee*, 190 Mich App 243, 247–50 (1991), the probate court dismissed a petition for termination of respondent's parental rights to his youngest daughter, which alleged that respondent was likely to sexually abuse this daughter at some time in the future. The petition was based in part on respondent's admission that he had sexually abused his oldest daughter five years earlier. The probate court concluded that petitioner failed to meet its burden of presenting clear and convincing evidence that respondent was likely to abuse his younger daughter at some time in the future. Three months later, the Department of Social Services (now the Family Independence Agency) filed a second petition to terminate respondent's parental rights to his youngest daughter. The second petition alleged that respondent had sexually abused the youngest daughter after the dismissal of the first termination petition. The probate court took new testimony regarding these allegations and then granted the petition for termination. On appeal, respondent argued that the doctrine of res judicata barred the second proceeding. The Court of Appeals held that the second action was not barred in this case, as the petitioner did not seek termination on the same grounds in both actions, and as new evidence and changed circumstances were presented in the second action.*

*See Sections 18.27–18.40 for summaries of the petition requirements for each statutory basis for termination of parental rights.

18.4 Standing to File Petition Requesting Termination of Parental Rights

The following persons may file an original, amended, or supplemental petition requesting that parental rights be terminated:

- the agency;
- the child;
- a guardian, custodian, or representative of the child;
- a foster parent with whom the child is living or has lived who has specific knowledge of behavior by the parent constituting grounds for termination under MCL 712A.19b(3)(b) or (g); MSA 27.3178(598.19b)(3)(b) or (g), and who has contacted the Family Independence Agency, prosecuting attorney, child's lawyer-guardian ad litem or attorney, and child's guardian ad litem (if any), and is satisfied

that none of the persons contacted intends to file a petition seeking to terminate parental rights;

- the Children's Ombudsman,* or

*See Section 2.22, Note.

- the prosecuting attorney, whether or not he or she is representing or acting as legal consultant to the agency or any other party.*

*See Section 7.14 for a discussion of the roles of the prosecuting attorney.

MCR 5.974(A)(2) and MCR 5.903(C)(3), and MCL 712A.19b(1); MSA 27.3178(598.19b)(1), and MCL 712A.19b(6); MSA 27.3178(598.19b)(6).

In *In re Huisman*, 230 Mich App 372, 378–83 (1998), the Court of Appeals held that a custodial parent has standing to file a petition requesting termination of the noncustodial parent's parental rights under the Juvenile Code. After the parents divorced, the child's mother attempted to kill the child to prevent further contact with the father. The mother was sentenced to prison. The father remarried and, after an unsuccessful attempt to obtain a step-parent adoption under the Adoption Code, filed a termination petition under the Juvenile Code. The Court of Appeals interpreted "custodian" as used in MCL 712A.19b(1); MSA 27.3178(598.19b)(1), to include a custodial parent. *Id.*, at 380–81.

However, in *In re Swope*, 190 Mich App 478, 480–81 (1991), the Court of Appeals held that adoptive parents did not have standing to petition the court under §19b of the Juvenile Code to terminate their own parental rights to their adopted daughter. The Court concluded that parents cannot petition to terminate their own parental rights "because the statute was clearly enacted for the protection of children, rather than for the convenience of parents." *Id.*, at 481.

18.5 "Respondent" Defined

*See Section 9.12 for a definition of "father."

When used in the context of a hearing on termination of parental rights, "respondent" means the natural or adoptive mother of the child, and/or the father of the child as defined in MCR 5.903(A)(4). MCR 5.974(B)(1)–(2).*

"Respondent" does not include persons other than the mother and father to whom legal custody has been given by court order, persons who are acting in the place of a mother or father, or other persons responsible for the control, care, and welfare of the child. MCR 5.974(B). See *In re Foster*, 226 Mich App 348, 357–59 (1997) (child's paternal grandmother, who was granted custody of the child during divorce proceedings involving child's parents, did not have standing to intervene in termination proceedings).

18.6 No Right to Jury Trial

There is no right to a jury during hearings to determine whether to terminate parental rights. MCR 5.974(A)(3), *In the Matter of Rebecca Oakes*, 53 Mich App 629, 631–32 (1974), and *In re Mathers*, 371 Mich 516, 531 (1963). However, a party is entitled to a jury during the "adjudicative phase" of proceedings involving a request for termination of parental rights made in an original petition.*

*See Section 18.17(B), below (termination at initial dispositional hearing).

Unless a party has demanded a trial by judge or jury, an attorney-referee may conduct the trial and further proceedings through the dispositional phase, which includes hearings on termination of parental rights. MCR 5.913(B). Only referees who are licensed to practice law in Michigan may conduct protective proceedings other than preliminary inquiries, preliminary hearings, and progress reviews. MCR 5.913(A)(3).*

*See Section 9.11 for required procedures to demand that a judge preside at trial and through the dispositional phase.

18.7 Appointment of Attorney for Respondent

If the respondent is not represented by an attorney, the respondent may request and receive a court-appointed attorney at any stage of the proceedings, including a hearing on termination of parental rights. See MCR 5.915(B)(1)(a)(ii) and MCL 712A.17c(4)(a)–(c); MSA 27.3178(598.17c)(4)(a)–(c). Where the respondent has not previously requested counsel during the proceedings, affirmative action by the respondent is required to have counsel appointed during the dispositional stage of proceedings. *In re Hall*, 188 Mich App 217, 220–22 (1991).*

*See Section 7.9 for a more detailed discussion.

18.8 Appointment of Lawyers and Guardians Ad Litem for Children*

- **F** Lawyer-guardians ad litem must be appointed for all children in all cases. MCL 712A.17c(7); MSA 27.3178(598.17c)(7). The powers and duties of lawyer-guardians ad litem are defined in MCL 712A.17d(1); MSA 27.3178(598.17d)(1).
- **F** An attorney may be appointed for the child in the court's discretion if the lawyer-guardian ad litem's determination of the child's best interests and the child's wishes are contradictory. MCL 712A.17d(2); MSA 27.3178(598.17d)(2). The attorney must then represent the child by advocating for the child's expressed wishes. MCL 712A.13a(1)(b); MSA 27.3178(598.13a)(1)(b).
- **F** A guardian ad litem should be appointed only if the court needs further assistance in determining the best interests of the child. The guardian ad litem need not be an attorney. MCL 712A.13a(1)(e); MSA 27.3178(598.13a)(1)(e), and MCL 712A.17c(10); MSA 27.3178(598.17c)(10).

*See Sections 7.10–7.13 for a detailed discussion of new statutory provisions requiring the appointment of lawyer-guardians ad litem and allowing for the appointment of children's attorneys and guardians ad litem.

18.9 Appearance of Prosecuting Attorney

If the court requests, the prosecuting attorney must appear at any proceeding. MCR 5.914(A).*

*See Section 7.14, for a more detailed discussion.

18.10 Notice Requirements

If the child is placed in the temporary custody of the court, the court may not enter a supplemental order of disposition providing for permanent custody of the child, except pursuant to issuance of summons or notice or at a "rehearing" or review hearing pursuant to MCL 712A.19; MSA 27.3178(598.19). MCL 712A.20; MSA 27.3178(598.20).*

*See Chapter 16 for a detailed discussion of review hearings.

A summons is required for hearings on termination of parental rights unless a prior court appearance of the party was in response to service by summons. If so, notice of hearing may be used. MCR 5.920(F).*

*See Section 5.4 for a detailed discussion of the use of summonses.

Prior to a hearing to terminate parental rights, the court must ensure that the following persons are notified in writing:

- the agency responsible for the child's care and supervision, which must advise the child of the hearing if the child is 11 years of age or older;
- the child's foster parent or custodian;
- if parental rights have not been terminated, the child's parents;
- the child's guardian;
- the child's guardian ad litem;
- the Indian tribe's elected leader (if tribal affiliation has been determined);*
- the child's attorney and each party's attorneys;
- the prosecuting attorney (if she or he has appeared);
- the child (if 11 years of age or older); and
- other persons as the court may direct.*

*See Section 20.4.

MCL 712A.19b(2)(a)–(i); MSA 27.3178(598.19b)(2)(a)–(i), MCR 5.921(B)(2)(a)–(k), and MCR 5.921(B)(3).

*See, especially, Sections 5.8–5.9 (notification of putative fathers and noncustodial parents).

Note: For purposes of a required notice, "attorney" includes "lawyer-guardians ad litem." MCL 712A.13a(1)(b); MSA 27.3178(598.13a)(1)(b). The appointment of counsel for a child is discussed in detail in Sections 7.10–7.13 and 18.8, above.

Notice of a hearing on a petition requesting termination of parental rights must be served on the appropriate persons in writing at least 14 days before

the hearing. MCR 5.920(C)(3)(b) and MCL 712A.19b(2); MSA 27.3178(598.19b)(2).

The court may direct that the child's appearance in court at a hearing to terminate parental rights is unnecessary. MCR 5.920(B)(2)(a) and (c).

If a respondent-parent is incarcerated, the three-part balancing test set forth in *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976), should be applied to determine whether due process requires the parent's presence at a hearing to terminate parental rights. *In re Vasquez*, 199 Mich App 44, 46–50 (1993), and *In re Render*, 145 Mich App 344, 348–50 (1985).

Thus, the court must balance the parent's compelling interest in her or his parental rights, the incremental risk of an erroneous deprivation of that interest if the parent is not present at the hearing, and the government's interest in avoiding the burden of securing the parent's presence at the hearing. Compare *Render, supra* (due process required presence of parent incarcerated in county jail, where parent's attorney had learned of parent's incarceration the day of the trial) and *Vasquez, supra* (due process did not require presence of parent in prison in Texas, where parent was well represented by counsel at the hearing).

18.11 Suspension of Parenting Time

If a petition requesting termination of parental rights has been filed, parenting time for a parent who is the subject of the petition is automatically suspended and, except as described below, remains suspended at least until a decision is issued on the termination petition. If, however, a parent whose parenting time has been suspended establishes, and the court determines, that parenting time will not harm the child, the court may order parenting time in the amount and under the conditions the court determines appropriate. MCL 712A.19b(4); MSA 27.3178(598.19b)(4).

Part II — Required Procedures

18.12 Types of Evidence That May Be Used to Establish Statutory Basis for Termination*

*See Chapter 20 for special requirements in cases involving Indian children.

When termination is sought on the basis of the allegations in the original petition or on the basis of changed circumstances, legally admissible evidence must be used to establish that the parent's conduct meets one or more of the statutory criteria for termination of parental rights. MCR 5.974(D)(3) and MCR 5.974(E)(1). However, if termination of parental rights is sought while the child is in foster care and on the same grounds that allowed the court to take jurisdiction of the child, all relevant and material

evidence may be admitted to determine whether one or more of the statutory criteria have been fulfilled. MCR 5.974(F)(2). The distinction between these two situations was succinctly stated by the Court of Appeals in *In re Snyder,* 223 Mich App 85, 89–90 (1997):

> "But the court rules distinguish two situations: (1) the basis for the court taking jurisdiction of a child is related to the basis for seeking termination of parental rights, and (2) the basis for the court taking jurisdiction of a child is unrelated to the basis for seeking termination of parental rights. In the first situation, legally admissible evidence (under the rules normally used in civil proceedings) will already have been adduced at the adjudicative-phase trial, and thus *supplemental* proofs, which are presented on a background of such legally admissible evidence, need not be admissible under the Michigan Rules of Evidence. MCR 5.974(D)(3) (termination sought in initial petition); MCR 5.974(F)(2) (termination based on grounds related to those established in initial petition). This will almost always be the case when termination is sought in the original petition.
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> "In the second situation, the basis for terminating parental rights lacks this background of legally admissible evidence from the adjudicative phase and, thus, such a foundation must be laid before probative evidence not admissible under the Michigan Rules of Evidence may be considered. MCR 5.974(E)(1). This may or may not be the case when termination is sought after the filing of the initial petition, depending on the grounds for termination alleged."

18.13 Burden of Proof Required to Establish Statutory Basis for Termination

There must be clear and convincing evidence that one or more of the statutory criteria allowing for termination of parental rights have been met. MCR 5.974(D)(3), MCR 5.974(E)(2), MCR 5.974(F)(3), and MCL 712A.19b(3); MSA 27.3178(598.19b)(3). The "clear and convincing evidence" standard is necessary to satisfy the requirements of due process under the Fourteenth Amendment to the United States Constitution. *Santosky v Kramer,* 455 US 745, 767; 102 S Ct 1388; 71 L Ed 2d 599 (1982).

The party seeking to terminate parental rights has the burden of proving that a statutory criterion for termination has been fulfilled. MCR 5.974(A)(3). The party seeking termination must prove parental unfitness according to the statutory standards in §19b of the Juvenile Code; termination of parental

rights is improper where it has only been shown that the child would be "better off" in foster care. *Fritts v Krugh,* 354 Mich 97, 115 (1958), and *In the Matter of Atkins,* 112 Mich App 528, 541 (1982).

In *In the Matter of Bedwell,* 160 Mich App 168 (1987), the trial court failed to specify a statutory basis for termination in its final order. Instead, the court's order provided that, based upon "stipulation of the parties," termination of the respondent's parental rights would not take effect for six months, and that the order would be set aside if the respondent satisfied 11 conditions in her Case Service Plan. *Id.,* at 171. Respondent failed to satisfy six of the conditions, and the court entered the order terminating her parental rights. On appeal, the Court of Appeals held that this procedure placed undue emphasis on compliance with the Case Service Plan. Noncompliance with the conditions of the court for reunification of the family may be considered but is not determinative of whether termination should occur. *Id.,* at 176. The Court stated that although a similar procedure was used by the trial court but not criticized in *In re Adrianson,* 105 Mich App 300, 319 (1981), in that case the petitioner had proven by clear and convincing evidence that parental rights should be terminated under the statute. *Id.,* at 177.

See also *In re Miller,* 182 Mich App 70, 83 (1990) (failure to comply with necessary court-ordered counseling may be one, though not the only, consideration in determining whether to terminate parental rights).

18.14 Burden of Proof Required for the "Best Interest" Step

If the court finds that there are grounds for termination of parental rights, the court must order termination, unless the court finds that termination is clearly not in the child's best interests. MCL 712A.19b(5); MSA 27.3178(598.19b)(5).

The parent has the burden of *going forward with evidence* showing that termination of parental rights is clearly not in the child's best interest. Therefore, if the parent produces no evidence that termination is clearly not in the child's best interest, the court must terminate parental rights. The burden of proof, however, remains with the party seeking termination. MCL 712A.19b(5); MSA 27.3178(598.19b)(5), *In re Miller,* 433 Mich 331, 344–46 (1989), *In the Matter of LaFlure,* 48 Mich App 377, 381–88 (1973), and *In re Hall-Smith,* 222 Mich App 470, 472–73 (1997).

A. Rules of Evidence Do Not Apply

*The parties may challenge the weight to be given written reports, especially since such reports generally contain "hearsay within hearsay." See Sections 11.6(F) and (G).

In determining whether termination of parental rights is clearly not in the best interest of the child, all relevant and material evidence, including oral and written reports, may be received by the court and relied upon to the extent of its probative value, even though such evidence may not be admissible at trial.* The respondent and the petitioner must be afforded an opportunity to examine and controvert written reports received and must be allowed to cross-examine the individuals who made the reports when those individuals are reasonably available. MCR 5.974(D)(3), MCR 5.974(E)(2), and MCR 5.974(F)(2).

The child's lawyer-guardian ad litem must "serve as the independent representative for the child's best interests," and is "entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child." MCL 712A.17d(1)(b); MSA 27.3178(598.17d)(1)(b). This provision suggests that the child's lawyer-guardian ad litem should be allowed an opportunity to controvert written reports and cross-examine the individuals who made the reports in the same manner as the petitioner and the respondent.

Note: It may avoid delay to require the petitioner to list evidence that will be tendered by written report, and to provide that list to the attorneys for the respondent and child. If either attorney wants to cross-examine the author of a report, that attorney may subpoena him or her.

B. Court Is Not Required to Place Child With Relatives

In determining whether termination of parental rights is clearly not in the child's best interest under MCL 712A.19b(5); MSA 27.3178(598.19b)(5), the court need not make findings with regard to the "best-interest factors" under the Child Custody Act. Examination of these factors may be appropriate in certain cases, however. *In re JS & SM*, 231 Mich App 92, 102 (1998).

If it is in the best interests of the child, the court may terminate parental rights instead of placing the child with relatives. See MCL 712A.1(3); MSA 27.3178(598.1)(3) (if child is removed from control of his or her parents, child should be placed in care as nearly as possible equivalent to the care that should have been provided by parents). See also the following cases:

- *In re IEM*, 233 Mich App 438, 450–54 (1999) (trial court did not err by failing to consider, prior to termination, placement of the respondent-mother and the child with the respondent's mother. Although the child's mother may be a fit custodian of the child following termination, that determination must be made independently of the decision to terminate parental rights);

- *In re McIntyre*, 192 Mich App 47, 52–53 (1991) (trial court properly considered the best interests of the children in terminating parental rights rather than placing the children with an uncle, even though the uncle made considerable efforts to plan for the children);
- *In re Sterling*, 162 Mich App 328, 341–42 (1987) (trial court did not err in terminating parental rights rather than continuing its temporary wardship of the child and placing the child with an aunt, where a previous placement with the aunt had failed);
- *In re Futch*, 144 Mich App 163, 168–70 (1984) (trial court did not err in terminating parental rights despite the availability of relatives with whom to place the child, where those relatives failed to intervene when they became aware of the physical abuse of the child); and
- *In re Brown*, 139 Mich App 17, 20–21 (1984) (trial court did not err in refusing to place the child with maternal grandmother rather than terminating parental rights, where the respondent-mother, whose psychotic episodes resulted in physical abuse of the child, would have been residing in the same house as the child).

18.15 Type of Permanent or Long-Term Neglect* Required for Termination

*Note that this Section deals only with termination of parental rights on grounds of neglect. The principles contained in this section do not apply in cases of abuse.

Although no precise definition exists of "neglect" allowing for termination of a parent's rights, the Michigan Supreme Court, in *Fritts v Krugh*, 354 Mich 97 (1958), provided the following guidance:

> "Here, we find the legislative intent plainly set forth in the use of the words 'temporary' and 'permanent.' In accordance with that legislative intent, we hold that, while evidence of temporary neglect may suffice for entry of an order taking temporary custody, the entry of an order for permanent custody due to neglect must be based upon testimony of such a nature as to establish or seriously threaten neglect of the child for the long-run future."
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> ". . . . There must be real evidence of long-time neglect, or serious threats to the future welfare of the child, to overthrow permanently the natural and legal right of parents to the custody and nurture of their own children."

Id., at 114 and 116.

In the Matter of LaFlure, 48 Mich App 377, 388–89 (1973), illustrates the necessity of finding long-term neglect prior to termination of parental rights. In *LaFlure*, respondent-mother worked as a cocktail waitress to support herself and her son. Late one evening, the police were called to respondent's home and found it in a filthy condition. Shortly thereafter, the probate court

found that it had jurisdiction over the child because of respondent's neglect. Fifteen months later, a petition to terminate respondent's parental rights was filed. A trial was held and the probate court terminated respondent's parental rights after finding that respondent operated a car without a valid driver's license, was involved in an auto accident (perhaps while intoxicated), entertained at home until late hours, drank "intoxicating liquor," and had an unstable third marriage. The Court of Appeals reversed, holding that this was not the type of permanent neglect necessary to terminate respondent's parental rights.

Nonetheless, termination of parental rights on grounds of neglect* is permissible "without regard to intent." MCL 712A.19b(3)(g); MSA 27.3178(598.19b)(3)(g). Thus, the parent's culpability need not be established for purposes of termination of parental rights.

*The statute refers to a failure to provide "proper care or custody."

18.16 Special Rules of Evidence Applicable to Termination Hearings

Evidence admitted at one hearing in a protective proceeding may be considered as evidence at all subsequent hearings. See *In re Slis,* 144 Mich App 678, 685 (1985) (in its findings of fact and conclusions of law, trial judge summarized family's history of involvement with community service agencies); *In re Adrianson,* 105 Mich App 300, 317 (1981) (allegations admitted at hearings on temporary custody of children may be considered by court at termination hearing); *In the Matter of Sharpe,* 68 Mich App 619, 625–26 (1976) (hearings in protective proceedings are to be considered "as a single continuous proceeding"); and *In the Matter of LaFlure,* 48 Mich App 377, 387 (1973) (due to the nature of the decision to terminate parental rights, court must be apprised of all relevant circumstances). The trial court may also take judicial notice of its court file. See MRE 201.

Evidence of the treatment of one child is probative of how the parent may treat the child's siblings. See SJI2d 97.07, and the following cases:

- *In the Matter of LaFlure,* 48 Mich App 377, 392 (1973) (respondent's treatment of her younger son was relevant at hearing to terminate respondent's parental rights to her older son);
- *In re Dittrick Infant,* 80 Mich App 219, 222 (1977) (where respondents' parental rights were terminated to respondent-mother's first child on grounds of continuing physical and sexual abuse, allegations of the neglect of the first child were relevant to a finding of neglect sufficient to allow the court to take jurisdiction over respondents' second child);
- *In re Kantola,* 139 Mich App 23, 28–29 (1984) (where evidence showed that respondents treated their son well but sexually, physically, and verbally abused their daughters, respondents' treatment of their son was not conclusive of their ability to provide a fit home for their daughters);
- *In re Futch,* 144 Mich App 163, 166–68 (1984) (evidence that respondents were convicted of manslaughter in the beating death of respondent-mother's first child supported termination of respondents' parental rights to a subsequent child);

- *In re Andeson*, 155 Mich App 615, 622 (1986) (where evidence suggested that respondent's physical abuse of a sibling led to the sibling's death, the probate court properly considered that evidence in terminating respondent's parental rights to another child);
- *In re Smebak*, 160 Mich App 122, 128–29 (1987) (evidence that respondent-mother's mental illness prevented her from providing proper care of sibling was probative of her ability to care for another child);
- *In re Emmons*, 165 Mich App 701, 704–05 (1988) (evidence of respondent-father's prior guilty plea to charge of sexually assaulting child's siblings was admissible to provide basis for jurisdiction over child); and
- *In re Powers*, 208 Mich App 582, 592–93 (1995) (where respondent-custodian was found to have physically abused respondent-mother's first child, evidence of that abuse was relevant to respondent-custodian's ability to provide proper care and custody for a sibling subsequently born to respondent-custodian and respondent-mother).

Where independent proof has been presented of the conduct leading to a criminal charge to which the respondent-parent pled no contest, a judgment of conviction or sentence may be received as evidence in a termination proceeding. *In re Andino*, 163 Mich App 764, 768–73 (1987). Although MRE 410 prevents evidence of a plea of no contest, or statements made in connection with such a plea, from being admitted as evidence against the person entering the plea in "any civil proceeding," the rules applicable to the dispositional phase of child protective proceedings allow such evidence to be considered. These more specific rules govern. *Id.*, at 769–70. In addition, allowing consideration of such evidence is consonant with the general goal of the Juvenile Code, which is to protect children. *Id.*, at 772–73.

Admission of hearsay evidence during the dispositional phase of a termination proceeding does not violate due process requirements if the evidence is fair, reliable, and trustworthy. *In re Hinson*, 135 Mich App 472, 474–75 (1984), *In re Ovalle*, 140 Mich App 79, 82 (1985), and *In re Shawboose*, 175 Mich App 637, 640 (1989) (trial court did not err in admitting the findings and recommendations of a Foster Care Review Board member at hearing on termination). However, where the grounds asserted for termination of parental rights are unrelated to those for which the court took jurisdiction of the child, legally admissible evidence must be used to establish the new grounds for termination.* *In re Snyder*, 223 Mich App 85, 89–91 (1997) (new allegations of sexual abuse admitted at termination hearing, while court took jurisdiction due to neglect).

*See Section 18.18, below, for a detailed discussion of this topic.

Neither the court nor another party to the case may call a lawyer-guardian ad litem as a witness to testify regarding matters related to the case. MCL 712A.17d(3); MSA 27.3178(598.17d)(3).*

*This rule is effective March 1, 1999. 1998 PA 480. See Sections 7.11 (powers and duties of lawyer-guardians ad litem) and 18.8, above.

18.17 Termination of Parental Rights at Initial Dispositional Hearing

There are certain serious circumstances where the Family Independence Agency is required by statute to file a petition to terminate parental rights at the first dispositional hearing. See MCL 722.638(1); MSA 25.248(18)(1), summarized below in Section 18.17(A). In all other cases, the petitioner has discretion to file a petition to terminate parental rights at the first dispositional hearing. See MCR 5.974(D), summarized below in Section 18.17(B).

A. Circumstances That Require Mandatory Petitions for Termination

MCL 722.638(1)(a)–(b); MSA 25.248(18)(1)(a)–(b), provides that the Family Independence Agency must file a petition seeking Family Division jurisdiction of the child if any of the following circumstances exist:

(a) The Family Independence Agency determines that a parent, guardian, or custodian, or a person who is 18 years of age or older and who resides for any length of time in the child's home, has abused the child or a sibling and the abuse included one or more of the following:

(i) abandonment of a young child;

(ii) criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate;

(iii) battering, torture, or other severe physical abuse;

(iv) loss or serious impairment of an organ or limb;

(v) life threatening injury; or

(vi) murder or attempted murder.

(b) The Family Independence Agency determines that there is a risk of harm to the child and either of the following is true:

(i) The parent's rights to another child were terminated as a result of proceedings under MCL 712A.2(b); MSA 27.3178(598.2)(b), or a similar law of another state.

(ii) The parent's rights to another child were voluntarily terminated following the initiation of proceedings under MCL 712A.2(b); MSA 27.3178(598.2)(b), or a similar law of another state.

If a mandatory petition for jurisdiction is filed under MCL 722.638(1)(a)–(b); MSA 25.248(18)(1)(a)–(b), and if a parent is a suspected perpetrator of the abuse or is suspected of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to

eliminate that risk, then the Family Independence Agency must include in the mandatory petition a request for termination of parental rights at the initial dispositional hearing. MCL 722.638(2); MSA 25.248(18)(2).

Note: MCL 722.638; MSA 25.248(18), was amended in 1998 to clarify when the Family Independence Agency is required to file a petition, and when that petition must contain a request for termination of parental rights. See 1998 PA 428, repealing 1998 PA 383. The amended provision, quoted above, is effective March 23, 1999. Under the provision in effect prior to March 23, 1999, the FIA was not required to determine, before filing a petition for court jurisdiction, that there was risk of harm to the child of a parent who had previously had his or her parental rights to another child terminated, and there was no requirement that the parent be the perpetrator or suspected of placing the child at an unreasonable risk of harm before the FIA was required to request termination of parental rights at the initial dispositional hearing.

B. Court Rule Provisions Governing Discretionary Petitions to Terminate

The court may terminate parental rights at the initial dispositional hearing if termination was requested in an original or amended petition. MCR 5.974(A)(2).

The court must order termination of a respondent's parental rights at the initial dispositional hearing if:

(1) the original, or amended, petition contains a request for termination;

(2) the trier of fact found by a preponderance of the evidence that the child comes under the jurisdiction of the court on the basis of MCL 712A.2(b); MSA 27.3178(598.2)(b);*

*See Chapter 12 (trials).

(3) the court finds on the basis of clear and convincing legally admissible evidence introduced at the trial, or at plea proceedings, on the issue of assumption of court jurisdiction, that one or more facts alleged in the petition:

(a) are true;

(b) justify terminating parental rights at the initial dispositional hearing; and

(c) fall under MCL 712A.19b(3); MSA 27.3178(598.19b)(3);*

*See Part III, below, for these statutory criteria.

unless the court finds that termination of parental rights is clearly not in the best interest of the child. MCR 5.974(D)(1)–(3).*

*See Section 18.14, above, for further discussion of the "best interest" step.

In determining whether termination of parental rights is clearly not in the best interest of the child, all relevant and material evidence, including oral and written reports, may be received by the court and relied upon to the extent of its probative value, even though such evidence may not be admissible at trial.* The respondent and the petitioner must be afforded an opportunity to examine and controvert written reports received and must be allowed to cross-examine the individuals who made the reports when those individuals are reasonably available. MCR 5.974(D) and MCR 5.974(F)(2).

*The parties may challenge the weight to be given written reports, especially since such reports generally contain "hearsay within hearsay." See Sections 11.6(F) and (G).

The child's lawyer-guardian ad litem must "serve as the independent representative for the child's best interests," and is "entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child." MCL 712A.17d(1)(b); MSA 27.3178(598.17d)(1)(b). This provision suggests that the child's lawyer-guardian ad litem should be allowed an opportunity to controvert written reports and cross-examine the individuals who made the reports in the same manner as the petitioner and the respondent.

Note: It may avoid delay to require the petitioner to list evidence that will be tendered by written report, and to provide that list to the attorneys for the respondent and child. If either attorney wants to cross-examine the author of a report, that attorney may subpoena him or her.

C. Required Conference to Decide Whether to Request Termination

If the Family Independence Agency is considering a request to terminate parental rights at the initial dispositional hearing, in cases where the agency is not required to request termination under MCL 722.638(1)(a)–(b); MSA 25.248(18)(1)(a)–(b), and MCL 722.638(2); MSA 25.248(18)(2), the agency must hold a conference among appropriate agency personnel to decide on a course of action. The agency must notify the attorney representing the child of the time and place of the conference, and the child's attorney may attend the conference. MCL 722.638(3); MSA 25.248(18)(3).

If an agreement is not reached at the conference, the agency director or a designee must resolve the disagreement after consulting with attorneys for the agency and the child. MCL 722.638(3); MSA 25.248(18)(3).

18.18 Termination of Parental Rights on the Basis of New or Different Offense Than That for Which Court Took Jurisdiction Over Child

The court may terminate parental rights after a supplemental petition has been filed on the basis of one or more circumstances that are new or different from the offense for which the court took jurisdiction. MCR 5.974(E).

The new or different circumstance must fall within MCL 712A.19b(3); MSA 27.3178(598.19b)(3),* and must be sufficient to warrant termination of parental rights. MCR 5.974(E).

*See Part III, below, for these statutory criteria.

A. No Time Requirement for Filing or Action on Supplemental Petition

When termination of parental rights is sought under MCR 5.974(E), there is no time requirement for filing of the supplemental petition or for the court's action on the supplemental petition. Instead, MCR 5.974(E) states that the court "may take action on a supplemental petition" that seeks termination on the basis of changed circumstances. This differs from the requirements for the filing of and action on a supplemental petition seeking termination when the child remains in foster care following a review or permanency planning hearing. See MCR 5.974(F)(1)(a) and (b).*

*See Section 18.19, below, for a discussion of these requirements.

B. Factfinding Step*

Legally admissible evidence must be used to establish the factual basis of parental unfitness sufficient to warrant termination of parental rights. MCR 5.974(E)(1) and *In re Snyder*, 223 Mich App 85, 90 (1997) (during termination proceeding, only legally admissible evidence may be used to establish grounds for termination that are different than allegations allowing court to acquire jurisdiction over child).

The proofs must be clear and convincing that one or more grounds exist for termination of respondent's parental rights under MCL 712A.19b(3); MSA 27.3178(598.19b)(3). MCR 5.974(E)(1).

*See Section 18.13, above, for further discussion of this step.

C. "Best Interest" Step*

If it is established by clear and convincing evidence that one or more grounds exist for termination of respondent's parental rights under MCL 712A.19b(3); MSA 27.3178(598.19b)(3), the court must order termination unless the court finds that termination is clearly not in the best interest of the child. MCR 5.974(E)(2).

*See Section 18.14, above, for further discussion of this step.

In determining whether termination of parental rights is clearly not in the best interest of the child, all relevant and material evidence, including oral and written reports, may be received by the court and relied upon to the extent of its probative value, even though such evidence may not be admissible at trial.* The respondent and the petitioner must be afforded an opportunity to examine and controvert written reports received and must be allowed to cross-examine the individuals who made the reports when those individuals are reasonably available. MCR 5.974(E)(2) and MCR 5.974(F)(2).

*The parties may challenge the weight to be given written reports, especially since such reports generally contain "hearsay within hearsay." See Sections 11.6(F) and (G).

The child's lawyer-guardian ad litem must "serve as the independent representative for the child's best interests," and is "entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child." MCL 712A.17d(1)(b); MSA 27.3178(598.17d)(1)(b). This provision suggests that the child's lawyer-guardian ad litem should be allowed an opportunity to controvert written reports and cross-examine the individuals who made the reports in the same manner as the petitioner and the respondent.

Note: It may avoid delay to require the petitioner to list evidence that will be tendered by written report, and to provide that list to the attorneys for the respondent and child. If either attorney wants to cross-examine the author of a report, that attorney may subpoena him or her.

The parent has the burden of *going forward with evidence* showing that termination of parental rights is clearly not in the child's best interest. Therefore, if the parent produces no evidence that termination is clearly not in the child's best interest, the court must terminate parental rights. The burden of proof, however, remains with the party seeking termination. MCL 712A.19b(5); MSA 27.3178(598.19b)(5), *In re Miller*, 433 Mich 331, 344–46 (1989), *In the Matter of LaFlure*, 48 Mich App 377, 381–88 (1973), and *In re Hall-Smith*, 222 Mich App 470, 472–73 (1997).

18.19 Termination of Parental Rights When the Child Is Still in Foster Care at Time of Review Hearings

If the child is in foster care in the temporary custody of the court, the court, following a review hearing or permanency planning hearing,* may act on a supplemental petition seeking termination of respondent's parental rights on the basis of one or more grounds in MCL 712A.19b(3); MSA 27.3178(598.19b)(3). MCR 5.974(F) and MCL 712A.19b(1); MSA 27.3178(598.19b)(1).

*See Chapters 16 and 17 for a discussion of these hearings.

A. Time Requirements for Filing Supplemental Petition

If the court determines at the dispositional review hearing or permanency planning hearing that the child should not be returned to the parent and the agency has failed to demonstrate that termination of parental rights is not clearly in the child's best interests, then a petition for termination must be filed no later than 42 days after the hearing. MCR 5.974(F)(1)(a).

B. Time Requirements for Holding a Hearing on the Supplemental Petition

The hearing on the supplemental petition must be held within 42 days after the filing of the supplemental petition. The court may extend the deadline for 21 days for good cause shown. MCR 5.974(F)(1)(b).

C. Rules of Evidence

All relevant and material evidence, including oral and written reports, may be received by the court and relied upon to the extent of its probative value, even though such evidence may not be admissible at trial.* The respondent and the petitioner must be afforded an opportunity to examine and controvert written reports received and must be allowed to cross-examine the individuals who made the reports when those individuals are reasonably available. MCR 5.974(F)(2).

*The parties may challenge the weight to be given written reports, especially since such reports generally contain "hearsay within hearsay." See Sections 11.6(F) and (G).

The child's lawyer-guardian ad litem must "serve as the independent representative for the child's best interests," and is "entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child." MCL 712A.17d(1)(b); MSA 27.3178(598.17d)(1)(b). This provision suggests that the child's lawyer-guardian ad litem should be allowed an opportunity to controvert written reports and cross-examine the individuals who made the reports in the same manner as the petitioner and the respondent.

Note: It may avoid delay to require the petitioner to list evidence that will be tendered by written report, and to provide that list to the attorneys for the respondent and child. If either attorney wants to cross-examine the author of a report, that attorney may subpoena him or her.

D. Standard of Proof

The proofs must be clear and convincing that one or more of the grounds in MCL 712A.19b(3); MSA 27.3178(598.19b)(3), exist sufficient to terminate respondent's parental rights. MCR 5.974(F)(3).

If it is established by clear and convincing evidence that one or more grounds exist for termination of respondent's parental rights under MCL 712A.19b(3); MSA 27.3178(598.19b)(3), the court must order termination unless the court finds that termination is clearly not in the best interest of the child. MCR 5.974(F)(3).

The parent has the burden of *going forward with evidence* showing that termination of parental rights is clearly not in the child's best interest. Therefore, if the parent produces no evidence that termination is clearly not in the child's best interest, the court must terminate parental rights. The burden of proof, however, remains with the party seeking termination. MCL 712A.19b(5); MSA 27.3178(598.19b)(5), *In re Miller*, 433 Mich 331, 344–46 (1989), *In the Matter of LaFlure*, 48 Mich App 377, 381–88 (1973), and *In re Hall-Smith*, 222 Mich App 470, 472–73 (1997).

18.20 Required Findings by the Court After Hearing on Petition for Termination

*See Forms JC 13 and 63.

The court must state on the record or in writing its findings of fact and conclusions of law. Brief, definite, and pertinent findings and conclusions on contested matters are sufficient. An opinion or order must be issued within 70 days after the commencement of the initial hearing on the petition requesting termination. MCL 712A.19b(1); MSA 27.3178(598.19b)(1). Failure to issue an order or opinion within 70 days, however, does not result in dismissal of the petition. MCL 712A.19b(1); MSA 27.3178(598.19b)(1).* See also MCR 5.974(G)(1), which requires the court, if it does not issue a decision on the record, to "file its decision within 28 days after the taking of final proofs, but no later than 70 days after the commencement of the hearing to terminate parental rights."

If the court finds that respondent's parental rights should not be terminated, the court must make findings of fact and conclusions of law. An order terminating parental rights must include findings of fact, conclusions of law, and the statutory basis for the order. MCR 5.974(G)(3).

18.21 Required Advice of Rights Following Termination of Parental Rights

Immediately after entering an order terminating parental rights, the court must advise the respondent parent orally or in writing that:

(a) respondent is entitled to appellate review of the order;

(b) if respondent is financially unable to provide an attorney to perfect an appeal, the court will appoint an attorney and furnish the attorney with the portions of the transcript and record the attorney requires to appeal;

(c) a request for the assistance of an attorney must be made within 21 days after notice of the order is given. The court must then give a form* to the respondent with the instructions (to be repeated on the form) that if respondent desires the appointment of an attorney, the form must be returned to the court within [21 days]; and

*See Form JC 44, which contains all of the advice required under this rule.

(d) respondent has the right to file a denial of release of identifying information, a revocation of a denial of release, and to keep current the respondent's name and address as provided in MCL 710.27; MSA 27.3178(555.27), as amended.

MCR 5.974(H)(1)(a)–(d).

18.22 Appointment of Appellate Counsel

If the request is timely filed and the court finds that respondent is financially unable to provide his or her own attorney, the court must appoint appellate counsel. If the request is untimely, the court may appoint appellate counsel in the interest of justice. MCR 5.974(H)(2). See, generally, *In re Conley*, 216 Mich App 41, 45 (1996) (Court of Appeals refused to require appointment of appellate counsel where tardiness of request was the only reason for denial of the request for counsel; appointment in such circumstances is within the court's discretion).

If the court finds that the respondent is financially unable to pay for the preparation of transcripts, the court may order transcripts prepared at public expense. MCR 5.974(H)(3). But see *MLB v SLJ*, 519 US 102, 113–16; 117 S Ct 555; 136 L Ed 2d 473 (1996) (state's conditioning of parent's appeal by right of an order terminating parental rights on prepayment of transcript fees is inconsistent with the requirements of due process and equal protection).

18.23 Voluntary Termination of Parental Rights*

*For special procedures applicable to cases involving Indian children, see Section 20.11.

A parent may voluntarily consent to termination of his or her parental rights without the court announcing a statutory basis for termination. *In re Toler*, 193 Mich App 474, 477 (1992). Note, however, that in child protective proceedings, *jurisdiction* cannot be conferred on the Family Division by consent of the parties. *In re Youmans*, 156 Mich App 679, 684 (1986). A determination that the Family Division has jurisdiction over the child pursuant to MCL 712A.2(b); MSA 27.3178(598.2)(b), is made following a plea or trial. See MCL 712A.18(1); MSA 27.3178(598.18)(1).

After it is determined that the children are within the court's jurisdiction under MCL 712A.2(b); MSA 27.3178(598.2)(b), the court has the authority to conduct a hearing to determine whether parental rights to the child should be terminated. See MCL 712A.19b; MSA 27.3178(598.19b), and *In the Matter of Taurus F*, 415 Mich 512, 526 (1982). A parent could then voluntarily relinquish parental rights.

A biological parent may voluntarily consent to a child's adoption or give a release to a child-placing agency for purposes of adoption. See MCL 710.28; MSA 27.3178(555.28), MCL 710.29; MSA 27.3178(555.29), and MCL 710.44; MSA 27.3178(555.44), and *In re Buckingham*, 141 Mich App 828, 834–37 (1985) (description of required procedures under the Adoption Code).

18.24 Termination of One Parent's Rights Under the Juvenile Code

The Michigan Court Rules and MCL 712A.19b; MSA 27.3178(598.19b), allow for the termination of the parental rights of one of two parents. See MCR 5.974 ("respondent" is used in singular throughout rule) and MCR 5.974(B)(1)–(2) ("respondent" defined as the natural or adoptive mother "and/or" the father of the child), and *In re Marin*, 198 Mich App 560, 566 (1993) (use of singular "parent" in §19b(1) indicates legislative intent to allow termination of one parent's rights).

For cases involving termination of one parent's rights, see the following:

- *In re Arntz*, 418 Mich 941 (1984) (father's parental rights were reinstated by the Michigan Supreme Court after the trial court terminated both parents' rights for respondent-mother's failure to visit the respondents' children, who were placed with paternal grandparents);
- *In the Matter of Campbell*, 129 Mich App 780, 784–85 (1983) (where respondent-mother's parental rights were terminated because of neglect, the trial court properly dismissed that portion of the petition pertaining to the child's noncustodial father, as the father, if he continued to participate in treatment, would be able to provide proper care for child);
- *In re Emmons*, 165 Mich App 701 (1988) (children were properly placed with their noncustodial parent following the termination of their custodial parent's rights on grounds of sexual abuse);
- *In re SR*, 229 Mich App 310, 316–17 (1998) (respondent-father's rights were properly terminated after he was convicted of attempting to murder his daughter and commit suicide, even though following conviction and before termination proceedings were initiated the child was in the custody of the non-offending parent and the offending parent was in prison); and
- *In re Huisman*, 230 Mich App 372, 382 (1998) (where the child's father and step-mother unsuccessfully attempted to terminate respondent-mother's parental rights under the "step-parent adoption" provisions of the Adoption Code, respondent-mother's rights were properly terminated under the Juvenile Code pursuant to a petition filed by the father and step-mother, and placement of the child with the father and step-mother was proper).

If all respondent-parents' parental rights to a child are terminated, the child will be placed in the permanent custody of the court. MCL 712A.19b(1); MSA 27.3178(598.19b)(1).

18.25 Termination of Parental Rights Under the Adoption Code

A. An Overview of Termination of Parental Rights Under the Adoption Code

The Adoption Code, MCL 710.21 et seq.; MSA 27.3178(555.21) et seq., provides for termination of parental rights under three circumstances. They are:

- A putative father's rights may be terminated if the putative father files an affidavit that admits paternity but denies his interest in custody of the child; files a disclaimer of paternity; fails to file a timely notice of intent to claim paternity; or fails to appear after receiving proper notice of hearing, or appears and denies his interest in custody of the child. MCL 710.37(1)(a)–(d); MSA 27.3178(555.37)(1)(a)–(d).
- If the putative father has not established a custodial relationship with the child or has not provided substantial and regular support or care, in accordance with his ability, for the mother during pregnancy or the child after its birth during the 90 days before notice of hearing is served on the putative father, the court may terminate the father's parental rights following a hearing under the Adoption Code if it is in the best interests of the child. MCL 710.39(2); MSA 27.3178(555.39)(2). *In the Matter of Baby Boy Barlow*, 404 Mich 216, 229 (1978).*
- A noncustodial parent's rights may be terminated if the custodial parent marries another person, and that person petitions to adopt the child, and the noncustodial parent has failed to support and communicate with the child for two years or more. MCL 710.51(6); MSA 27.3178(555.51)(6). This is commonly referred to as "step-parent adoption."

*The requirement in §39 that the father have provided "substantial and regular support or care" became effective September 1, 1998. See 1998 PA 94.

B. Required Procedures for Termination When There Is a Petition for Step-Parent Adoption

MCL 710.51(6)(a)–(b); MSA 27.3178(555.51)(6)(a)–(b), provides that if the custodial parent marries another person, and this other person wishes to adopt the child, the court may terminate the noncustodial parent's parental rights if the parent:

- having the ability to support or assist in supporting the child, has failed or neglected to provide regular and substantial support for the child or, if a support order has been entered, has failed to substantially comply with the order, for a period of two years or more before the filing of the petition; and
- having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of two years or more before the filing of the petition.

In determining whether the noncustodial parent has supported the child, the test is whether he or she "provided reasonable support or care under the circumstances of the case." *In re Gaipa*, 219 Mich App 80, 86 (1996). The

noncustodial parent must provide more than "incidental, fleeting, or inconsequential offer of support or care." *Id.*, at 85. The court may consider the noncustodial parent's ability to provide support or care, whether the custodial parent impeded the noncustodial parent's efforts, and similar factors. *Id.*, at 86. See also *In re Dawson,* 232 Mich App 690, 692–96 (1998) (filing by a putative father of a notice of intent to claim paternity does not constitute support or care, but the mother's efforts to prevent the putative father from providing support or care must be considered).

The requisite time period for lack of support or contact is two years or more, measured back in time starting with the filing of the petition for termination. In *In re Halbert,* 217 Mich App 607, 611–12 (1996), the Court held that the time period was not "tolled" during the non-custodial parent's incarceration. An incarcerated parent retains the ability to comply with the support and contact requirements of MCL 710.51(6)(a)–(b); MSA 27.3178(555.51)(6)(a)–(b). *In re Caldwell,* 228 Mich App 116 (1998), and *In re Hill,* 221 Mich App 683, 691–96 (1997).

In *In re Kaiser,* 222 Mich App 619 (1997), the non-custodial parent "substantially failed" to comply with a support order in a divorce judgment, where she failed to notify the Friend of the Court of her employment status for over three years. Moreover, she had the ability to support or assist in supporting the child but refused because she desired to retaliate against her ex-husband. *Id.*, at 621–23. However, she did not "substantially fail" to communicate with her child, where the court in the divorce proceeding had suspended visitation in the wake of sexual abuse allegations, and she had made good-faith efforts to re-establish visitation privileges by attending court-ordered counseling. *Id.*, at 623–25.

Where a parent has substantially failed to comply with a support order and has not petitioned the court for modification of the order, the court considering a petition for termination under MCL 710.51(6)(a)–(b); MSA 27.3178(555.51)(6)(a)–(b), need not examine the parent's reasons for noncompliance. *In re Martyn,* 161 Mich App 474, 480 (1987).

Similarly, where there has been no request for visitation privileges, the court may find that the non-custodial parent had the ability but failed to visit, contact, or communicate with the child. See *In re Simon,* 171 Mich App 443, 448–49 (1988) (two visits and one phone call in two years constitutes substantial failure), and *In re Colon,* 144 Mich App 805, 814 (1985) (8–11 visits in two-and-a-half years constitutes substantial failure).

Part III — Statutory Grounds for Termination of Parental Rights–§19b(3)

18.26 An Overview and History of §19b(3) of the Juvenile Code

Several of the cases cited in Sections 18.27–18.40, below, were decided under the statute governing termination of parental rights prior to its extensive revision in 1988. See 1988 PA 224, which added §19b to the Juvenile Code, effective April 1, 1989. Prior to 1988 PA 224, the grounds for termination of parental rights were contained in §19a of the Juvenile Code.

Since 1988, the number of statutory grounds for termination of parental rights under the Juvenile Code has increased from 6 to 14. See the following:

- 1990 PA 314, §1, added subsections (3)(d), (e), and (f), which provide for three different grounds for termination of parental rights after the appointment of a limited or "full" guardian.
- 1994 PA 264, §1, added subsection (3)(j), which provides for termination of parental rights if there is a reasonable likelihood that the child will be harmed if he or she is returned to the parent.
- 1997 PA 169 added subsections (3)(k), (l), and (m), which provide for termination of parental rights based upon the parents' prior abuse of another child, or upon the parents' prior voluntary or involuntary termination of parental rights to another child.
- 1998 PA 530 added subsection (3)(n), which provides for termination of parental rights based upon the parents' conviction of a serious criminal offense. 1998 PA 530 also added subsection (3)(b)(iii), which provides for termination of parental rights when a child or sibling of the child has suffered a physical injury or sexual abuse caused by a nonparent adult.

Cases decided under older versions of the statute governing termination of parental rights may still be useful for guidance in a particular case. Therefore, they are provided below in "note boxes," along with quotations of the statutory language that existed at the time the cases were decided. Relevant statutory history is also provided in margin notes.

It should also be noted that termination of parental rights is rarely sought under a single statutory provision. This is partly because several of the statutory provisions overlap or cover the same conduct or condition. For example, a parent who deserts or abandons a child may have his or her rights terminated under §19b(3)(a) (desertion), §19b(3)(c) (failure to rectify condition leading to the taking of jurisdiction), §19b(3)(g) (neglect), and §19b(3)(j) (reasonable likelihood of harm to child if returned home). Other combinations are also possible. When parental rights were terminated under more than one statutory provision, it will be noted below.

MCL 712A.19b(3); MSA 27.3178(598.19b)(3), currently provides that the court may terminate a parent's parental rights if it finds, by clear and convincing evidence, that one or more of the following statutory criteria, discussed in Sections 18.27–18.40, are fulfilled.

18.27 Termination on the Grounds of Desertion–§19b(3)(a)

The court may terminate a parent's parental rights if it finds, by clear and convincing evidence, that the child has been deserted under one or more of the following circumstances:

(i) the child's parent is unidentifiable, has deserted the child for 28 or more days, and has not sought custody of the child during that period. For purposes of this section, a parent is unidentifiable if the parent's identity cannot be ascertained after reasonable efforts have been made to locate and identify the parent, or

(ii) the child's parent has deserted the child for 91 or more days and has not sought custody of the child during that period.

Petition Requirements

A petition based on subsection (3)(a)(i) should include:

- the date that the child was deserted and the number of days that have passed since that date;
- the circumstances under which the child was deserted; and
- the facts that support the finding that reasonable but unsuccessful efforts have been made to locate and identify the parents and that at least 28 days have passed since the child was deserted.

A petition based on subsection (3)(a)(ii) should include:

- the date that the child was deserted and the number of days that have passed since that date;
- the circumstances under which the child was deserted;
- the names of the parents; and
- the facts that support the finding that the parents have not sought custody of the child for at least 91 days following the parents' desertion of the child.

Case Law

The following cases construe §19b(3)(a)(ii) (identified parent has deserted child for 91 days or more and has not sought custody):

F *In re Hall*, 188 Mich App 217, 223–24 (1991)*

Where respondent-mother had "little or no contact" with her children after they were placed with their grandmother, the evidence was sufficient for termination under §19b(3)(a)(ii).

F *In re Mayfield*, 198 Mich App 226, 230, 235 (1993)*

Where the respondent-noncustodial parent failed to appear at hearings, failed to provide support, and had not seen his son for over two years, there was clear and convincing evidence supporting termination under §19b(3)(a)(ii).

*Termination in both *Hall* and *Mayfield* was also granted because of respondents' failure to provide proper care or custody (neglect). See §19b(3)(g), discussed at Section 18.33, below.

Note: Prior to the enactment of 1988 PA 224, the predecessor to current §19b(3)(a) stated that termination was proper upon a finding that:
"(b) The child is left with intent of desertion and abandonment by his parent or guardian in the care of another person without provision for his support or without communication for a period of at least 6 months. The failure to provide support or to communicate for a period of at least 6 months shall be presumptive evidence of the parent's intent to abandon the child. If, in the opinion of the court, the evidence indicates that the parent or guardian has not made regular and substantial efforts to support or communicate with the child, the court may declare the child deserted and abandoned by his parent or guardian." MCL 712A.19a(b); MSA 27.3178(598.19a)(b) (repealed as of April 1, 1989).

For cases interpreting this section, see the following:
—*In re Sterling*, 162 Mich App 328, 336 (1987) (where unrefuted evidence established that respondent failed to support and had no contact with her children during the six months prior to the termination hearing, termination was proper);
—*In re Sears*, 150 Mich App 555, 561 (1986) (respondent's failure to support or communicate with her children, who were placed with temporary guardian, for three years prior to termination hearing constituted presumptive evidence of desertion and abandonment); and
—*In the Matter of Schejbal*, 131 Mich App 833, 837 (1984) (termination was proper where the children were abandoned after they were placed in foster care).

18.28 Termination on the Grounds of Physical Injury or Sexual Abuse–§19b(3)(b)

The court may terminate a parent's parental rights if it finds, by clear and convincing evidence, that the child or a sibling of the child has suffered physical injury or physical or sexual abuse under either of the following circumstances:

(i) the parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home;

(ii) the parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home; or

(iii) a nonparent adult's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse by the nonparent adult in the foreseeable future if placed in the parent's home.*

*§19b(3)(b)(iii) became effective July 1, 1999. See 1998 PA 530. See Section 3.5 for a definition of "nonparent adult."

Petition Requirements

A petition based on subsection (3)(b)(i) should include:

- a description of the respondent-parent's acts that caused the child's injuries or abuse;
- a description of the injury or abuse suffered by the child;
- the name of the child or sibling who suffered the injury or abuse; and
- the facts that support a finding that the child will suffer further injury or abuse if returned to the care of the respondent-parent.

A petition based on subsection (3)(b)(ii) should include:

- the name of the parent who caused the child's injury or abuse;
- a description of the acts that caused the injury or abuse;
- a description of the injury or abuse suffered by the child;
- the name of the child or sibling who suffered the injury or abuse;
- a description of how the respondent-parent had the opportunity to prevent the injury or abuse and failed to do so; and
- the facts that support a finding that the child will suffer further injury or abuse if returned to the home of the respondent-parent.

A petition based on subsection (3)(b)(iii) should include:

- the name of the nonparent adult who caused the child's injury or abuse;
- a description of the acts that caused the injury or abuse;
- a description of the injury or abuse suffered by the child;
- the name of the child or sibling who suffered the injury or abuse; and
- the facts that support a finding that the child will suffer further injury or abuse by the nonparent adult if returned to the home of the respondent-parent.

Note 1: The current §19b(3)(b)(ii) requires proof of an "opportunity to prevent" the injury or abuse and a failure to do so. It is unclear whether this subsection requires proof of an intentional omission. See *In re Farley,* 437 Mich 992 (1991) (Levin, J, would have granted leave to appeal on the issue of whether the respondent-mother, who was diagnosed as suffering from "battered wife syndrome," could have prevented abuse of her children).

Note 2: Subsection (3)(b)(iii) differs from subsection (3)(b)(ii) in that it does *not* require that the parent failed to prevent the injury or abuse, but only requires that the injury or abuse was caused by a nonparent adult and that there is a reasonable likelihood that the child will suffer from injury or abuse by the nonparent adult in the foreseeable future if placed in the parent's home.

Case Law

The following cases construe §19b(3)(b)(i) (physical injury or physical or sexual abuse of a child or child's sibling by a parent):

F *In re Vasquez,* 199 Mich App 44, 51–52 (1993)*

Testimony at trial indicated that respondent-father had sexually abused his daughter from the age of three, fractured his daughter's arm, fractured his son's skull with a blunt object, and that he had locked his twin daughters in a closet for approximately 12 hours without food or water to conceal them from investigators. The Court of Appeals upheld the termination of respondent-father's rights under §19b(3)(b)(i).

*Rights were also terminated under §19b(3)(a)(ii) (desertion), §19b(3)(c)(i) (failure to rectify condition leading to jurisdiction), §19b(3)(g) (neglect), §19b(3)(h) (imprisonment), and §19b(3)(i) (termination of rights to siblings).

F *In re Powers,* 208 Mich App 582 (1995)*

Respondent was the live-in boyfriend of the mother of a boy who had been removed from the mother's care due to her inability to protect the boy from respondent's physical abuse. Respondent was not the biological father and was not a party to the prior proceedings. A petition was filed seeking termination of respondent's parental rights to a daughter who was subsequently born to respondent and the mother, on grounds of "anticipatory abuse or neglect." Respondent argued, and the Court of Appeals agreed, that respondent's parental rights to his daughter could not be terminated under §19b(3)(b)(i) because that statutory subsection requires

*Rights were terminated, however, under §19b(3)(c)(i) (failure to rectify condition leading to jurisdiction) and §19b(3)(g) (neglect).

that the respondent must be the "parent" of the previously abused child. *Id.*, at 588–91.

Note 3: See, however, §19b(3)(b)(iii), discussed above, which became effective July 1, 1999, and which now allows for termination even when the prior abuse was by a nonparent adult.

Note 4: There are no reported cases construing the current §19b(3)(b)(ii). However, the following cases were decided under §19a(e) ("unable to provide a fit home for the child by reason of neglect") of the termination statute prior to its amendment in 1988. In these cases, the Court of Appeals broadly interpreted former §19a(e) to include situations where one parent allowed the other parent to behave in a manner that created an unfit home environment for their children. The Juvenile Code was then amended by 1988 PA 224 to add §19b(3)(b). This amendment, therefore, did not create new grounds for termination but merely added to the statute some grounds that had already been created by case law.

—*In re Miller*, 182 Mich App 70, 74, 82 (1990)* (the Court of Appeals upheld termination of respondent-mother's parental rights, where respondent father physically abused their children, locked them in their rooms for extended periods, and failed to seek needed medical treatment. Although respondent-mother reported the incidents of physical abuse to authorities, the court found that she permitted the continuance of an abusive and neglectful environment and returned home with the children after being in an assault crisis center. Psychological evaluations indicated that respondent-mother refused to "stand up" to respondent-father and placed her own needs before those of the children);
—*In re Parshall*, 159 Mich App 683, 690 (1987) (the respondent-father was a "passive-aggressive/dependent" person who allowed his "angry/anti-social" wife to cause death and serious injuries to two of their children);
—*In re Sprite*, 155 Mich App 531, 536 (1986) (mother's parental rights properly terminated where she offered little or no support to her daughters and allowed father to continue seeing them after she learned that father had sexually abused them);
—*In re Brown*, 149 Mich App 529, 541, 543–44 (1986) (the respondent-mother was "unable to provide a fit home by reason of neglect" because she allowed a man known to sexually molest children to be with her children; however, respondent's parental rights were improperly terminated because respondent was not personally served with the petition for jurisdiction and a notice of the time and place of the hearing); and
—*In re Rinesmith*, 144 Mich App 475, 483–84 (1985) (mother's parental rights terminated for failing to protect children from physical and sexual abuse by the father).

*See National Council of Juvenile and Family Court Judges, *Effective Intervention in Domestic Violence and Child Maltreatment Cases: Guidelines for Policy and Practice* (Reno: University of Nevada, Reno), forthcoming.

18.29 Termination on the Grounds of Failure to Rectify Conditions Following the Court's Assumption of Jurisdiction–§19b(3)(c)

The court may terminate a parent's parental rights if it finds that the parent was a respondent in a proceeding brought under the Juvenile Code, 182 or more days have elapsed since the issuance of an initial dispositional order,

and the court, by clear and convincing evidence, finds either of the following:

(i) the conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age, or

(ii) other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

Petition Requirements

A petition based on subsection (3)(c)(i) should include:

- the date that the dispositional order was issued and the number of days (at least 182) that have passed since that date;
- a description of the conditions that led to the respondent's adjudication; and
- the facts that support the finding that these conditions continue to exist and there is no reasonable likelihood that these conditions will be rectified within a reasonable time considering the child's age.

A petition based on subsection (3)(c)(ii) should include:

- the date that the dispositional order was issued and the number of days (at least 182) that have passed since that date;
- a description of the conditions that led to the respondent's adjudication;
- a description of the additional conditions that now exist that cause the child to come within the court's jurisdiction;
- a description of the notice and opportunity for a hearing that has been given to respondent regarding these additional conditions; and
- the facts that support the finding that the respondent has been given a reasonable opportunity to rectify these additional conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

Case Law

The following cases were decided under §19b(3)(c)(i) (conditions that led to court's assumption of jurisdiction continue to exist):

F *In re McIntyre*, 192 Mich App 47, 50–52 (1991)*

*Termination was also upheld because of respondent's failure to provide proper care or custody. See §19b(3)(g), discussed at Section 18.33, below.

The Court of Appeals held that the trial court did not err in terminating respondent-mother's parental rights, where the court took jurisdiction because of respondent's extended incarceration, and where the caseworker determined that respondent's planned placement of the child with a relative was inappropriate. Termination was proper even though the relative expended considerable effort to plan for custody of the child.

F *In re Newman*, 189 Mich App 61 (1991)

The Court of Appeals held that the probate court erred in terminating respondents' parental rights to their five children because respondents were never given adequate instruction by the Department of Social Services (now the Family Independence Agency) on how to maintain a clean home, and because respondents were never given adequate instruction by the DSS on how to supervise one of their five children, who had severe behavioral problems, which resulted in injuries to respondents' other four children.

F *In re Dahms*, 187 Mich App 644, 647 (1991)

Where expert testimony suggested that respondent-mother had a "fair" chance of becoming capable of raising her three children, who were aged three years to five years, after two to three years of therapy, the trial court did not err in terminating her parental rights. There was clear and convincing evidence of abuse and neglect, and the two-to-three-year period was unreasonable given the ages and great needs of the children.

Note: The following cases were decided under the former MCL 712A.19a(f); MSA 27.3178(598.19a)(f), which allowed for termination of parental rights where:
"The child has been in foster care in the temporary custody of the court on the basis of a neglect petition for a period of at least 2 years and upon rehearing the parents fail to establish a reasonable probability that they will be able to reestablish a proper home for the child within the following 12 months."

—*In re Miller,* 433 Mich 331, 338, 343–44 (1989) (despite respondent's record of steady employment, financial support of his son, acceptable compliance with the trial court's orders, and lack of support from the child's mother and respondent's own parents, termination was proper. There was clear and convincing evidence of respondent's inappropriate physical discipline, unresolved abuse of alcohol, assaultive behavior, and lack of visitation. Nor did the trial court place undue emphasis on an incident in which respondent smeared feces on his son's face following a toilet-training accident);
—*In re Pasco,* 150 Mich App 816, 820–22 (1986) (the trial court properly found that respondent-mother failed to reëstablish a proper home by moving repeatedly and failing to improve parenting skills, where there was clear and convincing evidence of physical and emotional neglect);
—*In the Matter of Mason,* 140 Mich App 734, 737 (1985) (failure to comply with a court-ordered treatment plan does not, by itself, justify termination of parental rights. There must also be clear and convincing evidence that one or more of the statutory criteria have been met. In *Mason,* the trial court erroneously terminated respondent-mother's parental rights even though she failed to attend parenting classes and visitation appointments and made minimal progress in counseling);
—*In re Ovalle,* 140 Mich App 79, 83–84 (1985) (where the children were in foster care for 930 days after three separate removals from the home, respondent-mother repeatedly disobeyed court orders and failed to kick her drug habit, and respondent-father was sentenced to 7-20 years for criminal sexual conduct, the trial court did not err in terminating both parents' parental rights);
—*In the Matter of Moore,* 134 Mich App 586, 598 (1984) (despite respondent-mother's repeated moves, "emotional weakness," conviction for prostitution, documented emotional problems, her children's 22-month stay in foster care, and the recent addition of a newborn, the trial court erred in terminating her parental rights); and
—*In re Joseph Boughan,* 127 Mich App 357, 364 (1983) (the petition alleged sufficient facts to support termination of parental rights, where respondent-mother, for more than two years, made "no substantial progress" in caring for the physical and medical needs of her son).

18.30 Termination on the Grounds of Substantial Failure to Comply With Limited Guardianship Placement Plan–§19b(3)(d)*

*§§19b(3)(d)-(f) became effective December 2, 1990. See 1990 PA 314, §1. There have been no reported cases decided under these statutory sections.

The court may terminate a parent's parental rights if it finds, by clear and convincing evidence, that the child's parent has placed the child in a limited guardianship under MCL 700.424a; MSA 27.5424(1), and has substantially failed, without good cause, to comply with a limited guardianship placement plan regarding the child to the extent that the non-compliance has resulted in a disruption of the parent-child relationship.

Petition Requirements*

*See Section 3.14(A) for a discussion of the corresponding provision in §2(b) of the Juvenile Code, which allows the court to take jurisdiction when a parent fails to comply with a limited guardianship placement plan.

A petition based on subsection (3)(d) should include:

- a copy of the limited guardianship placement plan entered into by respondent, and
- the facts that support the finding that the respondent has substantially failed, without good cause, to comply with the limited guardianship placement plan to the extent that the non-compliance has resulted in a disruption of the parent-child relationship.

18.31 Termination on the Grounds of Substantial Failure to Comply With Court-Structured Guardianship Placement Plan–§19b(3)(e)

The court may terminate a parent's parental rights if it finds, by clear and convincing evidence, that the child has a guardian under the Revised Probate Code, and the parent has substantially failed, without good cause, to comply with a court-structured plan described in MCL 700.424b or 700.424c; MSA 27.5424(2) or 27.5424(3), regarding the child to the extent that the non-compliance has resulted in a disruption of the parent-child relationship.

Petition Requirements*

*See Section 3.14(B) for a discussion of the corresponding provision in §2(b) of the Juvenile Code, which allows the court to take jurisdiction when a parent fails to comply with a court-structured guardianship placement plan.

A petition based on subsection (3)(e) should include:

- a copy of the court-structured guardianship plan ordered by the court, and
- the facts that support the finding that respondent has substantially failed, without good cause, to comply with the court-structured guardianship plan to the extent that the non-compliance has resulted in a disruption of the parent-child relationship.

18.32 Termination on the Grounds of Parent's Failure to Support, Visit, Contact, and Communicate With Child Who Has Guardian–§19b(3)(f)

The court may terminate a parent's parental rights if it finds, by clear and convincing evidence, that the child has a guardian under the Revised Probate Code and both of the following are true:

(i) the parent, having the ability to support or assist in supporting the minor, has failed or neglected, without good cause, to provide regular and substantial support for the minor for a period of two years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for a period of two years or more before the filing of the petition, and

(ii) the parent, having the ability to visit, contact, or communicate with the minor, has regularly and substantially failed or neglected, without good cause, to do so for a period of two years or more before the filing of the petition.

Petition Requirements*

A petition based on subsection (3)(f) should include:

- a copy of the limited guardianship placement plan entered into by respondent or of the court-structured guardianship plan ordered by the court;
- the facts that support the finding that respondent had the ability to assist in the support of the child and has failed, without good cause, to provide regular and substantial support to the child for two years or more before the filing of the petition for termination; and
- the facts that support the finding that respondent had the ability to visit, contact, or communicate with the child and has failed, without good cause, to do so for a period of two years or more before the filing of the petition for termination.

*See Section 3.14(C) for a discussion of the corresponding provision in §2(b) of the Juvenile Code, which allows the court to take jurisdiction when a parent has failed to support and contact a child who has a guardian.

18.33 Termination on the Grounds of Failure to Provide Proper Care or Custody–§19b(3)(g)*

*In 1988, when §19b was added to the Juvenile Code, this statutory ground for termination was designated as §19b(3)(d). In 1990, after subsections (3)(d)–(f) were added, this subsection became renumbered as §19b(3)(g).

The court may terminate a parent's parental rights if it finds, by clear and convincing evidence, that the parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

Petition Requirements

A petition based on subsection (3)(g) should include:

- the facts that support the finding that respondent, without regard to intent, has failed to provide proper care or custody for the child, and
- the facts that support the finding that there is no reasonable likelihood that respondent will be able to provide proper care and custody within a reasonable time considering the child's age.

Case Law

The following cases construe §19b(3)(g):

- *In re IEM*, 233 Mich App 438, 450–54 (1999)*

**Maynard* involved an Indian child. For the special requirements for termination of parental rights to Indian children, see Sections 20.10–20.11.

Termination of the respondent-mother's parental rights was proper, where evidence showed that respondent due to emotional and cognitive problems would be unable to be an effective parent no matter how well she was assisted. Therefore, the trial court did not err by failing to place the child with respondent in the grandmother's home.

- *In re Huisman*, 230 Mich App 372, 384–85 (1998)

Respondent-mother's parental rights were properly terminated, where she attempted to murder her child to prevent visitation with the noncustodial parent, respondent was serving an 8-25 year sentence for this, and the evidence showed that respondent's serious emotional problems would continue to exist in the future.

- *In re Hamlet (After Remand)*, 225 Mich App 505, 515–17 (1997)

The Court of Appeals upheld the trial court's order terminating the respondent-father's parental rights. Respondent was incarcerated for most of the lives of his two children, and expert witnesses testified to his poor parenting skills, his lack of cooperation in court-ordered counseling to improve those skills, and his inability to improve those skills within a reasonable time.

F *In re Conley,* 216 Mich App 41, 43–44 (1996)*

Where respondent-mother failed to control her alcoholism resulting in the neglect of her children's needs, termination of her parental rights was proper.*

F *In re Jackson,* 199 Mich App 22, 25–28 (1993)*

Where respondent was diagnosed as a paranoid schizophrenic and repeatedly left the children alone in the home, termination of her parental rights was proper.

F *In re King,* 186 Mich App 458, 462–64 (1990)*

Termination of respondent-mother's parental rights was proper, where her apartment was littered with trash and feces, she was repeatedly evicted from other apartments, and where she left the children unattended for extended periods and neglected their physical needs.

F *In re Systma,* 197 Mich App 453, 457 (1992)

Termination of respondent-father's parental rights was proper, where he had not kept in contact with his child since he and the child's mother divorced, he had a drinking problem and an extensive criminal record, and where he was released from prison but reoffended within two weeks and would therefore be incarcerated for at least another year.

F *In re Perry,* 193 Mich App 648, 649–51 (1992)

Respondent-father was convicted of raping one of his children and sentenced to three-and-a-half to five years in prison. On the basis of this prison sentence, the Department of Social Services (now the Family Independence Agency) petitioned to terminate respondent's parental rights. At the time of the termination hearing, respondent had served enough time so that he would be eligible for parole in less than two years. The Court of Appeals, quoting *In re Neal,* 163 Mich App 522, 527 (1987), stated that the proper determination under what is now §19b(3)(h) is "'whether the imprisonment will deprive a child of a normal home for two years in the future, and not whether past incarceration has already deprived the child of a normal home.'" However, the Court of Appeals noted that the DSS could have petitioned for termination of respondent's parental rights under §19b(3)(g) (improper care or custody) because that subsection does not have the same two-year requirement that is contained in §19b(3)(h). The Court of Appeals concluded, therefore, that it was harmless error to terminate respondent's rights under §19b(3)(h) because those parental rights clearly could have been terminated under §19b(3)(g).

*In *Conley, Jackson, and King,* rights were also terminated under §19b(3)(c)(i) (failure to rectify condition that allowed court to take jurisdiction). See Section 18.29, above.

Note 1: *In re Perry* and *In re Systma* demonstrate the interrelationship between subsections (3)(g) (improper care or custody) and (3)(h) (imprisonment of respondent-parent). A failure to provide proper care or custody can be caused by imprisonment. Therefore, because subsection (3)(g) does not contain the two-year time requirement of subsection (3)(h), subsection (3)(g) will, in most cases, be easier to establish than subsection (3)(h). See *Perry, supra,* at 650.

Note 2: The following cases were decided under the former MCL 712A.19a(e); MSA 27.3178(598.19a)(e), which allowed for termination of parental rights where the "parent or guardian is unable to provide a fit home for the child by reason of neglect."

General Neglect

—*In re Schmeltzer,* 175 Mich App 666, 675–79 (1989) (where the respondents' child failed to thrive while in respondents' care for only 4 months and there was evidence of physical abuse, termination was proper);

—*In re Campbell,* 170 Mich App 243, 253–55 (1988) (where respondent was repeatedly institutionalized and her children were physically and sexually abused, termination was proper);

—*In re Webster,* 170 Mich App 100, 109–10 (1988) (where respondents' child was living in a home amid animal and other filth, with inadequate sleeping arrangements, and was malnourished, and where respondents exhibited "bizarre ideation and behavior," termination was proper);

—*In re Kellogg,* 157 Mich App 148, 150–58 (1987) (where respondent's emotional neglect of children was due to respondent's depression, evidence was insufficient for termination under subsection 19a(e) (neglect), but the case was remanded for consideration under subsection 19a(c) (neglect due to mental illness));

—*In re Youmans,* 156 Mich App 679, 688–90 (1986) (respondents' neglect of special medical needs of one child justified termination of parental rights to that child);

—*In the Matter of Riffe,* 147 Mich App 658, 670–73 (1985) (where respondent's child was diagnosed with a "failure to thrive," and where child's parents engaged in fistfight in home, termination was proper); and

—*In re Adrianson,* 105 Mich App 300, 315–18 (1981) (where testimony established her children's need for stability and the necessity of long-term treatment for respondent-mother, termination was proper).

Drug Abuse Causing Neglect

—*In re Shawboose,* 175 Mich App 637, 641 (1989) (where respondent's alcoholism and disinclination to correct the problem caused the neglect of her children, termination was proper);

—*In re Sterling,* 162 Mich App 328, 336–41 (1987) (evidence of respondent's drug addiction and failure to support or communicate with her children supported termination);

—*In re Andeson,* 155 Mich App 615, 621–22 (1986) (where respondent-father was "abusive, obnoxious, and belligerent" when using alcohol and was implicated in a sibling's death, termination was proper); and

—*In re Dupras,* 140 Mich App 171, 174–75 (1984) (where there was long-term alcohol abuse by both parents, termination of respondent-father's parental rights was proper for failure to remedy neglect resulting from mother's more profound alcohol abuse).

Note 2, continued

Preference for One Child Resulting in Neglect of Another Child

—*In re Kantola*, 139 Mich App 23, 27–29 (1984) (where respondents abused their female children, termination of parental rights to those children was proper even though a male child had previously been returned home from foster care);

—*In the Matter of Bell*, 138 Mich App 184, 186 (1984) (termination was proper where evidence showed the respondents' neglect of their younger child and a marked preference for their older child); and

—*In re Franzel*, 24 Mich App 371, 374–75 (1970) (termination was proper where respondents showed preference for older child).

Note 3: Under the former MCL 712A.19a(c); MSA 27.3178(598.19a)(c), parental rights could be terminated where "[a] parent or guardian of the child is unable to provide proper care and custody for a period in excess of 2 years because of a mental deficiency or mental illness, without a reasonable expectation that the parent will be able to assume care and custody of the child within a reasonable length of time considering the age of the child." The current statute, §19b(3)(g), has fewer requirements than former §19a(c). For example, the current statute does not require that the lack of proper care or custody must last at least two years, or that this lack of care or custody must be caused by mental deficiency or mental illness. For cases interpreting the former statutory provision, see the following.

Neglect Due to Mental Deficiency or Mental Illness

—*In re Banas*, 174 Mich App 525 (1988) (where respondent was plagued by an unspecified mental illness, termination was proper under either subsection 19a(c) (mental illness) or 19a(e) (neglect));

—*In re Gass*, 173 Mich App 444, 447–52 (1988) (where respondent suffered from a mental deficiency and a severe seizure disorder that severely limited her ability to care for her child, termination was proper);

—*In re Springer*, 172 Mich App 466, 474 (1988) (where respondent's mental illness contributed to the starvation deaths of two of the children's siblings, termination of parental rights to the children was proper);

—*In re Spratt*, 170 Mich App 719 (1988) (termination was proper where respondent's paranoid schizophrenia or manic depressive disorder rendered her unable to assume the care and custody of her son within a reasonable time);

—*In re Smebak*, 160 Mich App 122, 128–29 (1987) (where respondent was institutionalized as "paranoid psychotic" with a poor prognosis, termination was proper);

—*In re McCombs*, 160 Mich App 621, 627–29 (1987) (where respondent suffered from severe mental deficiency and mental illness that required her to obtain assistance to care for her own needs, termination of parental rights to her baby was proper);

—*In re Kreft*, 148 Mich App 682 (1986) (where respondent suffered from a long-term mental illness that caused delusions, and where respondent and her child lived in unsanitary conditions, termination was proper under the heightened standards required by the federal Indian Child Welfare Act);

—*In re Brown*, 139 Mich App 17, 21–22 (1984) (where respondent's psychotic episodes resulted in physical abuse of the child, termination of parental rights was proper);

Note 3, continued
—*In re Bailey*, 125 Mich App 522, 527–29 (1983) (where both respondent-parents and their child had mental deficiencies and physical defects, termination under subsection 19a(c) was proper, as respondent-parents would be unable to attend to the child's special needs; termination of parental rights for neglect was improper, though it was held to be harmless error); and
—*In the Matter of Atkins*, 112 Mich App 528, 533–39 (1982) (respondent's extended history of depression and drug abuse supported a finding that she would be unable to provide proper care and custody within the requisite time period).

18.34 Termination on the Grounds of Imprisonment of the Parent–§19b(3)(h)

The court may terminate a parent's parental rights if it finds, by clear and convincing evidence, that the parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding two years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

Petition Requirements

A petition based on subsection (3)(h) should include:

- the facts that support a finding that respondent will be imprisoned for a period exceeding two years after the hearing on the petition to terminate parental rights;
- the facts that support the finding that respondent has not provided for the child's proper care and custody; and
- the facts that support the finding that there is no reasonable expectation that respondent will be able to provide proper care and custody within a reasonable time considering the child's age.

Note 1: The last two elements of subsection (3)(h) are identical to the only two elements of subsection (3)(g). See Section 18.33, above. Thus, if these last elements are satisfied but the first is not, termination is nevertheless proper under subsection (3)(g).

Case Law

The following case shows the relationship between §19b(3)(g) (neglect) and §19b(3)(h):

F *In re Perry*, 193 Mich App 648, 649–51 (1992)

Respondent-father was convicted of raping one of his children and sentenced to three-and-a-half to five years in prison. On the basis of this prison sentence, the Department of Social Services (now the Family Independence Agency) petitioned to terminate respondent's parental rights. At the time of the termination hearing, respondent had served enough time so that he would be eligible for parole in less than two years. The Court of Appeals, quoting *In re Neal*, 163 Mich App 522, 527 (1987), stated that the proper determination under what is now §19b(3)(h) is "'whether the imprisonment will deprive a child of a normal home for two years in the future, and not whether past incarceration has already deprived the child of a normal home.'" However, the Court of Appeals noted that the DSS could have petitioned for termination of respondent's parental rights under §19b(3)(g) (improper care or custody) because that subsection does not have the same two-year requirement that is contained in §19b(3)(h). The Court of Appeals concluded, therefore, that it was harmless error to terminate respondent's rights under §19b(3)(h) because those parental rights clearly could have been terminated under §19b(3)(g).

Note 2: The following cases were decided under the former §19a(d), which allowed for termination of parental rights where:
"A parent or guardian of the child is convicted of a felony of a nature as to prove the unfitness of the parent or guardian to have future custody of the child or if the parent or guardian is imprisoned for such a period that the child will be deprived of a normal home for a period of more than 2 years."

—*In re Vernia*, 178 Mich App 280, 282 (1989) (where respondent-mother conceded that termination of her rights was proper because she was imprisoned for 10–20 years for various serious offenses, the Court of Appeals found it unnecessary to consider whether termination for neglect was proper);
—*In re Hurlbut*, 154 Mich App 417, 424 (1986) (termination of respondent's parental rights was proper, as he was serving a life sentence for first-degree murder);
—*In re Futch*, 144 Mich App 163, 168–70 (1984) (the probate court did not err in terminating respondents' parental rights to their two-year-old daughter, where respondents had been convicted of beating their older daughter to death and had been sentenced to 10 to 15 years in prison. Furthermore, the probate court did not err by failing to place the two-year-old child with relatives of respondents who had knowledge of the beatings and did nothing to stop them); and
—*In re Irving*, 134 Mich App 678, 681 (1984) (termination of parental rights was proper where respondent's child had been in the temporary custody of the court for six years, and respondent was then convicted of arson for the burning of the house in which she and her other children lived).

18.35 Termination on the Grounds of Prior Termination of Parental Rights to Siblings–§19b(3)(i)*

*See Section 18.16, above, which contains a discussion of the rule contained in case law that how a parent treats one child is probative of how a parent treats another child. §19b(3)(i) appears to be based upon this rule.

The court may terminate a parent's parental rights if it finds, by clear and convincing evidence, that parental rights to one or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful.

Petition Requirements

A petition based on subsection (3)(i) should include:

- the facts that establish that parental rights to one or more of the child's siblings have been terminated;
- the facts that establish that the termination was due to serious and chronic neglect or physical or sexual abuse of the child's sibling(s); and
- the facts that establish that prior attempts to rehabilitate the parent(s) have been unsuccessful.

Case Law

The following case construed (in dicta) the requirements of subsection (3)(i).

- *In re Powers,* 208 Mich App 582 (1995)

Respondent was the live-in boyfriend of the mother of a boy removed from the mother's care due to her inability to protect the boy from respondent's physical abuse. Respondent was not the biological father and was not a party to the prior proceedings. A petition was filed seeking termination of respondent's parental rights to a daughter who was subsequently born to respondent and the mother, on grounds of "anticipatory abuse or neglect." Respondent argued, and the Court of Appeals agreed, that respondent's parental rights to his daughter could not be terminated under §19b(3)(b)(i) because that statutory subsection requires that the respondent must be the "parent" of the previously abused child. *Id.*, at 588–91. However, the Court of Appeals stated (in dicta) that respondent's parental rights could be terminated under §19b(3)(i) because that statutory subsection only requires that parental rights to one or more of the child's siblings have already been terminated, and does not require that those parental rights that were terminated must have been respondent's parental rights. *Id.*, at 592.

Note: Subsections (3)(i) and (3)(l) (discussed at Section 18.38, below) are very similar in that they both allow for termination based on prior involuntary termination of parental rights to other children. There are significant differences between these two subsections, however. Therefore, a petitioner should carefully review the petition requirements for each subsection before proceeding.

18.36 Termination on the Grounds of Reasonable Likelihood of Harm to Child–§19b(3)(j)*

*§19b(3)(j) became effective January 1, 1995. See 1994 PA 264, §1. There have been no reported cases interpreting this provision since it became effective.

The court may terminate a parent's parental rights if it finds, by clear and convincing evidence, that there is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

Petition Requirements

A petition based on subsection (3)(j) should include:

- **F** the facts that support the finding, based on the conduct or capacity of respondent, that there is a reasonable likelihood that the child will be harmed if he or she is returned to the home of respondent.

18.37 Termination on the Grounds of Serious Abuse of Child or Sibling–§19b(3)(k)*

*§19b(3)(k) became effective March 31, 1998. See 1997 PA 169. There have been no reported cases interpreting this provision since it became effective.

The court may terminate a parent's parental rights if it finds, by clear and convincing evidence, that the parent abused the child or a sibling of the child and the abuse included one or more of the following:

(i) abandonment of a young child;

(ii) criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate;

(ii) battering, torture, or other severe physical abuse;

(iv) loss or serious impairment of an organ or limb;

(v) life threatening injury; or

(vi) murder or attempted murder.

Petition Requirements

A petition based on subsection (3)(k) should include:

- **F** the facts that support the finding that respondent abused the child or a sibling of the child, and that this abuse included one or more of the criminal acts described in subsection (3)(k).

Note: The requirements for subsection (3)(k) differ from the requirements for subsections (3)(i), (3)(l), and (3)(m), in that subsection (3)(k) does not require that parental rights must have been previously terminated to another child.

18.38 Termination on the Grounds of Prior Involuntary Termination of Parental Rights to Another Child–§19b(3)(l)*

*§19b(3)(l) became effective March 31, 1998. See 1997 PA 169. There have been no reported cases interpreting this provision since it became effective.

The court may terminate a parent's parental rights if it finds, by clear and convincing evidence, that the parent's rights to another child were terminated as a result of proceedings under MCL 712A.2(b); MSA 27.3178(598.2)(b), or a similar law of another state.

Petition Requirements

A petition based on subsection (3)(l) should include:

- the facts that support the finding that respondent's parental rights to another child were terminated under the Michigan Juvenile Code or a similar law of another state.

Note 1: If parental rights were terminated under the law of another state, petitioner should attach a copy of that law to the petition.

Note 2: Subsections (3)(i) (discussed at Section 18.35, above) and (3)(l) are very similar in that they both allow for termination based on prior involuntary termination of parental rights to other children. There are significant differences between these two subsections, however. Therefore, a petitioner should carefully review the petition requirements for each subsection before proceeding.

18.39 Termination on the Grounds of Prior Voluntary Termination of Parental Rights to Another Child–§19b(3)(m)*

*§19b(3)(m) became effective March 31, 1998. See 1997 PA 169. There have been no reported cases interpreting this provision since it became effective.

The court may terminate a parent's parental rights if it finds, by clear and convincing evidence, that the parent's rights to another child were voluntarily terminated following the initiation of proceedings under MCL 712A.2(b); MSA 27.3178(598.2)(b), or a similar law of another state.

Petition Requirements

A petition based on subsection (3)(m) should include:

- facts that support the finding that the respondent-parent's parental rights to another child were voluntarily terminated following the initiation of proceedings under §2(b) of the Michigan Juvenile Code or a similar law of another state.

Note: If parental rights were terminated under the law of another state, petitioner should attach a copy of that law to the petition.

18.40 Termination on the Grounds of Conviction of a Serious Offense–§19b(3)(n)*

*§19b(3)(n) became effective July 1, 1999. See 1998 PA 530. There have been no reported cases interpreting this provision since it became effective.

The court may terminate a parent's parental rights if it finds, by clear and convincing evidence, that the parent is convicted of one or more of the following, and the court determines that termination is in the child's best interests because continuing the parent-child relationship with the parent would be harmful to the child:

(i) a violation of:

- first-degree murder, MCL 750.316; MSA 28.548;
- second-degree murder, MCL 750.317; MSA 28.549;
- first-, second-, third-, or fourth-degree criminal sexual conduct, MCL 750.520b–750.520e; MSA 28.788(2)–28.788(5); or
- assault with intent to commit criminal sexual conduct, MCL 750.520g; MSA 28.788(7);

(ii) a violation of a criminal statute, an element which is the use of force or the threat of force, and which subjects the parent to an enhanced sentence under the habitual offender sentencing provisions of the Code of Criminal Procedure, MCL 769.10, 769.11, and 769.12; MSA 28.1082, 28.1083, and 28.1084; or

(iii) a federal law or law of another state with provisions substantially similar to a crime or procedure listed or described in subparagraph (i) or (ii).

Petition Requirements

A petition based on subsection (3)(n) should include:

- the facts that support the finding that respondent was convicted of one of the criminal offenses listed in subsection (3)(n), and
- the facts that support the finding that termination is in the child's best interests because continuing the parent-child relationship with respondent would be harmful to the child.

Note: If respondent's conviction occurred under the law of another state, or under federal law, petitioner should attach a copy of that law to the petition.